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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 329.

HENRY RUSSELL, LAWRENCE MILLER, CHARLES STEERS and JOHN P. WING, co-partners doing business under the firm name of RUSSELL, MILLER & CAREY, and SAMUEL A. PLEASANTS,

Petitioners,

against

JAMES S. TODD, JOSEPH R. WORK and WILLARD C. WEISS, co-partners doing business under the firm name of J. S. TODD & CO., on behalf of themselves and all other creditors of THE OHIO JOINT STOCK LAND BANK OF CINCINNATI, OHIO,

Respondents,

and

HOWARD Y. LISSENDEN, HENRY TRUXTON EMERSON, WILLARD C. WEISS and ALEX LOWENTHAL, as Members of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, Creditors' Protective Committee,

Intervenors-Respondents.

MEMORANDUM IN OPPOSITION TO PETITION FOR REHEARING.

GEORGE A. SPIEGELBERG,
Counsel for Respondents and Intervenors-Respondents.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

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MEMORANDUM IN OPPOSITION TO PETITION FOR REHEARING.

Statement.

The sole purpose of this memorandum is to demonstrate the complete inapplicability of the pending appeal to the Court of Appeals of the State of New York in the case of *Mencher* v. *Richards* (N. Y. L. J., December 27th, 1939, p. 2324; 258 App. Div. Mem.). This limitation is self-imposed

only because of the time limitation prevailing and not because any of the arguments advanced by the petitioners is valid. The pendency of the appeal in the *Mencher* case is urged by the petitioners as the main reason for staying the mandate of this Court and permitting reargument of the appeal involved in this case (Petitioners' Petition, pp. 16 and 17).

The appeal to the Court of Appeals in the *Mencher* case, *supra*, as stated by the petitioners was allowed by the Appellate Division on January 23rd, 1940. The appeal, however, is on a certified question which reads as follows:

> "Was an examination before trial of the defendant Empire Trust & Guarantee Company, a moneyed corporation, as to items 9, 10, 11, 12, 13, 18, 19, 20, 21 and 22 and of the individual defendants Richards, Paulson and Ohlau, directors of a moneyed corporation, as to items 2, 3, 4, 5, 6, 11, 12, 13, 14 and 15, set forth in plaintiff's notice of motion properly denied as a matter of law."

The items concerning which the plaintiff seeks to examine the defendant Empire Trust & Guarantee Company as well as the items concerning which it seeks to examine the individual defendants Richards, Paulson and Ohlau, are concerned with transactions for which, as the Appellate Division said (256 App. Div. 280) "a money judgment is the only available remedy" and to which that Court applied the six year statute of limitations (Civil Practice Act, Section 48, Subdivision 3), which it further limited by the three year statute set forth in Section 49, Subdivision 4 "inasmuch as the affected corporation is a moneyed corporation." The appeal in the *Mencher* case in no way involves those paragraphs of the plaintiff's complaint which the

Appellate Division held in 256 App. Div. 280 set forth a cause of action remediable alone in equity.

The claim of the appellant in the present appeal in the *Mencher* case is based upon the argument that even as to those paragraphs setting forth a cause of action remediable at law, he should be allowed to examine because he claims that they are governed by Section 49, Subdivision 4 of the Civil Practice Act (the three year statute) rather than Section 48, Subdivision 3), of the Civil Practice Act (the six year statute), and that Section 49, Subdivision 4, does not begin to run "until the discovery by the plaintiff of the facts under which * * * the liability was created", and that it is, therefore, impossible to ascertain in advance of the trial whether the statute is or is not a bar. From this premise he concludes that a decision denying him a right to examine before trial, as a matter of law, is incorrect since the applicability of the three year statute depends upon facts which he should be entitled to develop at the trial.

The Court of Appeals, as shown by the certified question above quoted, will, therefore, be called upon in the *Mencher* case to decide whether as to a cause of action admittedly legal for which the law grants adequate remedy, a decision barring examination before trial is correct as a matter of law. The answer to this question will depend upon whether the six year statute contained in Section 48, Subdivision 3, or the three year statute contained in Section 49, Subdivision 4 of the Civil Practice Act is the applicable legal section. That this is the basis of the appeal is obvious from the dissent of the presiding justice of the Appellate Division who believed that examination of the items should be allowed because, according to his views, "the statute applicable is Section 49, Subdivision 4 of the

Civil Practice Act under which to determine the time limit a trial is required."

The pending appeal in the *Mencher* case is solely by the plaintiff. There is no cross appeal by the defendants from that part of the order which permits the examination of the defendants as to those portions of the complaint which the Appellate Division determined in 256 App. Div. 280 stated a cause of action for equitable relief.

Counsel for plaintiff-appellant in the *Mencher* case has informed counsel for the respondents in this appeal that he intends also to argue that the ten year statute applies to those causes of action which the Appellate Division in 256 App. Div. 280 held to be cognizable at law on the ground that the only adequate relief the plaintiff can procure is an injunction, *i. e.*, an equitable remedy, and thus counsel for the plaintiff-appellant in the *Mencher* case hopes indirectly to have reviewed as to this point the decision of the Appellate Division in 256 App. Div. 280 where a review was denied.

It is incomprehensible that any possible decision by the Court of Appeals in the pending appeal in the Mencher case can affect the decision of this Court in *Russell, et al* v. *Todd et al.* That this is so a brief examination of the possible decisions will convincingly demonstrate.

The question before the Court in the Mencher case is the propriety of the action of the Appellate Division in denying as a matter of law an examination before trial as to causes of action expressly held by the Appellate Division to be remediable at law on the ground that the statute of limitations, as a matter of law, barred the relief and, therefore, barred an examination of the defendants. If the Court of Appeals, in view of the fact that the defendants are a moneyed corporation and its officers and directors,

decides that the legal statute of limitations contained in Civil Practice Act Section 49, Subdivision 4, is applicable, it may reverse on the ground that that statute does not begin to run until the plaintiff has discovered the facts giving rise to his cause of action, and that a trial is necessary to determine whether the statute has run.

If the Court of Appeals believes that the six year legal statute of limitations contained in Civil Practice Act Section 48, Subdivision 3, is the relevant statute, it will affirm, since that statute runs irrespective of the plaintiff's knowledge.

If the Court of Appeals believes that the paragraphs of the complaint concerning which an examination is sought set forth a cause of action adequately remediable only in equity, they will reverse and extend the application of the doctrine set forth in Mencher v. Richards reported in 256 App. Div. 280 to the entire complaint rather than to a part of the complaint as was done by the lower Court. These are the only possible decisions which the Court can render in view of the questions raised by the appeal before them.

It is, of course, conceivable that the Court of Appeals may use the pending appeal in the Mencher case as a vehicle to express its general views as to the situations in which the ten year statute of limitations will and will not be applied, but even if it adopted this unprecedented procedure, it is unthinkable that it would by pure dicta overthrow its recent decisions in *Hanover Fire Ins. Co.* v. *Morse Drydock & Repair Co.*, 270 N. Y. 86, and *Potter* v. *Walker*, 276 N. Y. 15, and unless it did so, any decision it might render could not affect the decision of this Court in *Russell, et al* v. *Todd, et al.*

Though perhaps unnecessary, we feel it desirable to point out that the case of *Gilbert* v. *Ackerman*, 159 N. Y.

118, 121, cited and discussed at pages 12 to 15 of the petition is entirely misapprehended by the petitioners. They cite the case for the authority that Section 49, Subdivision 4, "embraces all causes of action against directors", *i.e.*, equitable as well as legal. This is not the effect of that decision at all, although the sentence quoted by the petitioners lifted from its context lends itself to the argument made. What the Court of Appeals decided in that case becomes evident upon a review of the opinion of the Appellate Division, the decision of which was affirmed by the Court of Appeals. In 33 App. Div. at page 372, the following language is used:

> "Prior to the passage of that act (Section 49(4) as amended), the Statute of Limitation in reference to actions against directors or stockholders of a moneyed corporation, required that actions to enforce a liability created by statute should be brought within three years after the cause of action had accrued; but where the liability was created by the common law, the six-year Statute of Limitations still applied, and this six-year statute was the one which was in operation at the time the liability of the defendant Ackerman, if any, accrued. The act of 1897 included within the three-year Statute of Limitations, liabilities existing under the common law."

It is obvious that the common law liabilities to which the Court was referring in *Gilbert* v. *Ackerman, supra*, and which it deemed to have been included within the purview of Section 49(4) by its amendment into its present form, were those common law liabilities where the six year statute of limitations previously applied. The only thing stated by the Court of Appeals in the *Gilbert* case, *supra*, was that the legal causes of action previously subject to the six year

statute were included after the 1897 amendment in Section 49(4).

If any doubt remains in view of the foregoing analysis, it must be set at rest in view of the later decision of the Court of Appeals in *Hanna* v. *Peoples National Bank*, 179 N. Y. 107, affirming the lower Court which had expressly held that the Civil Practice Act Section 53 (the ten-year statute) and not Section 49 Subdivision 4 (the three year statute) was applicable in an action against the directors of a moneyed corporation where the cause of action was remediable only in equity. A full discussion of the *Hanna* case appears at page 35 of the respondents' brief submitted upon the argument of the case at bar.

Conclusion.

The petition for rehearing, together with stay of mandate, or alternatively, for extension of time within which to apply for rehearing and for stay of mandate should be denied.

Respectfully submitted,

GEORGE A. SPIEGELBERG,
Counsel for Respondents and
Intervenors-Respondents.

March 21st, 1940.